

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
LEWIS T. BABCOCK, CHIEF JUDGE

FILED  
UNITED STATES DISTRICT COURT  
DENVER, COLORADO

APR - 2 2004

Civil Case No. 03-B-1939 (BNB)

GREGORY C. LANGHAM  
CLERK

DAKOTA RESOURCE COUNCIL,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and  
MICHAEL O. LEVITT, in his official capacity as the Acting Administrator of EPA,

Defendants.

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ORDER

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This matter is before me on Defendants' Motion to Dismiss, filed on December 15, 2004, for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) or for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). In addition, the following three motions to intervene are pending: Motion to Intervene as Defendants By Basin Electric Power Cooperative, Great River Energy, Montana-Dakota Utilities Co., Minnkota Power Cooperative, Inc., and Otter Tail Corporation d/b/a Otter Tail Power Company, filed on December 4, 2003; Motion to Intervene of Lignite Energy Council, filed on December 23, 2003; and Motion to Intervene by State of North Dakota and North Dakota Department of Health, a State Agency, filed on January 5, 2004.

As oral argument would not materially assist in the determination of the motions, I VACATE the hearing set for Friday, April 16, 2004 at 3:00 P.M. After consideration of the motions, the briefs, and the case file, I GRANT Defendant's motion to dismiss for lack of subject matter jurisdiction and, as a result, I DENY the motions to intervene as moot.

## I. Background

This is a citizen action brought pursuant to the Clean Air Act, 42 U.S.C. §§7470, *et. seq.* Plaintiff, Dakota Resource Council ("DRC"), filed suit seeking declaratory relief and an order directing Defendants, the United States Environmental Protection Agency and Michael O. Levitt, in his official capacity as the Acting Administrator of EPA (the "EPA"), to require the State of North Dakota to modify its "State Implementation Plan" (the "SIP"). Specifically, DRC alleges that the EPA has failed to perform its nondiscretionary duty to issue a "call" requiring North Dakota immediately revise its SIP under 42 U.S.C. § 7410(k)(5). DRC's suit is based on its allegation that North Dakota's current SIP has resulted in excessive levels of sulfur dioxide in various national parks, wilderness areas, and Indian reservations in North Dakota and Montana.

## II. Motion to Dismiss for Lack of Subject Matter Jurisdiction

### A. Fed. R. Civ. P. 12(b)(1):

Fed. R. Civ. P. 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." Statutes conferring jurisdiction on federal courts are to be strictly construed. *See F & S Constr. Co. v. Jensen*, 337 F.2d 160, 161 (10<sup>th</sup> Cir. 1964).

A Fed. R. Civ. P. 12(b)(1) motion to dismiss "must be determined from [the] allegations of fact in [the] complaint, without regard to mere conclusory allegations of jurisdiction." *Groundhog v. Keller*, 442 F.2d 674, 677 (10<sup>th</sup> Cir. 1971). The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction. *See Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10<sup>th</sup> Cir. 1974).

Motions to dismiss pursuant to Rule 12(b)(1) may take two forms. First, if a party attacks the facial sufficiency of the complaint, the court must accept the allegations of the complaint as

true. *See Holt v. United States*, 46 F.3d 1000, 1002-03 (10<sup>th</sup> Cir. 1995). Second, if a party attacks the factual assertions regarding subject-matter jurisdiction, as is relevant here, the court may make its own findings of fact. *Id.* at 1003. A court's consideration of evidence outside the pleadings will not convert the motion to dismiss to a motion for summary judgment under Fed. R. Civ. P. 56. *Id.* (the "court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)").

**B. Discussion:**

DRC brings this citizen action under 42 U.S.C.A. § 7604(a)(2), which provides that "any person may commence a civil action on his own behalf . . . against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." DRC's Complaint is based on 42 U.S.C.A. § 7410(k)(5), which requires that:

Whenever the Administrator finds that the applicable [SIP] plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, . . . or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies.

DRC claims that the SIP at issue here is substantially inadequate based on the EPA's numerous determinations of sulfur dioxide increment violations. As such, DRC's suit alleges that the EPA must – as a nondiscretionary matter under 42 U.S.C.A. § 7410(k)(5) (the EPA "shall require the State to revise the plan as necessary to correct such inadequacies") (emphasis added) – issue a call to North Dakota to revise its SIP to correct such inadequacies. In support of its claim, DRC refers me to 40 C.F.R. § 51.166(a)(3), which states that "[i]f the State or the Administrator determines that a plan is substantially inadequate to prevent significant

deterioration *or that an applicable increment is being violated*, the plan *shall* be revised to correct the inadequacy or the violation." (emphasis added).

However, the EPA asserts, and my review confirms, that the documents relied upon by Plaintiff in support of its contention that the EPA has made findings of sulfur dioxide increment violations, which, in turn, trigger its allegedly nondiscretionary duty to issue a SIP call, are "qualified" and do not indicate such a finding because the documents are in draft form, contain predictions only, or specifically assert that no final action was being taken by the EPA. DRC has not referred me to any persuasive documentation of a underlying "finding" or "determination" by the EPA of sulfur dioxide increment violations. Rather, the correspondence, draft reports, and Federal Register notices relied on by DRC consist of preliminary concerns for which the EPA is addressing and attempting to work with North Dakota to eliminate. *See Sierra Club v. Browner*, 130 F. Supp. 2d 78, 89 (D. D.C. 2001)(rejecting the argument that EPA statements and conclusions other than a formal determination still qualify as a determination).

In addition, I note that the EPA asserts, without any challenge by DRC, that such a finding must be made by the "Administrator" which, in this case due to the limited delegation of authority within the EPA, means the Regional Administrator. *See* §§ 7-10 & 7-27 of the EPA's Delegation Manual. Because no finding has been made by the Regional Administrator, no adequate finding has been made under either 42 U.S.C.A. § 7410(k)(5) or 40 C.F.R. § 51.166(a)(3).

Therefore, I conclude that DRC's assertion that the underlying requisite finding of sulfur dioxide increment violations, which no one disputes is a discretionary determination by the EPA, is not supported by the allegations. Because the underlying finding has not yet been made, there

can be no discretionary or nondiscretionary duty upon the EPA to issue a SIP call and, as such, there is no subject matter jurisdiction under 42 U.S.C. § 7604(a)(2). *See Mountain States Legal Foundation v. Costle*, 630 F.2d 754, 766 (10<sup>th</sup> Cir. 1980)(Congress has restricted citizen suits to actions seeking to enforce specific nondiscretionary clear-cut requirements of the Clean Air Act); *Dubois v. Thomas*, 820 F.2d 943, 951 (8<sup>th</sup> Cir.1987).

### III. Motion to Dismiss for Failure to State a Claim

In light of my ruling dismissing for lack of subject matter jurisdiction, I do not reach the EPA's alternate claim that this case should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

### IV. Motions to Intervene

Likewise, my dismissal of this case for lack of subject matter jurisdiction renders the pending motions to intervene moot.


Accordingly, IT IS ORDERED that:

1. Defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) is GRANTED, and the case is DISMISSED WITH PREJUDICE;
2. The Motion to Intervene as Defendants By Basin Electric Power Cooperative, Great River Energy, Montana-Dakota Utilities Co., Minnkota Power Cooperative, Inc., and Otter Tail Corporation d/b/a Otter Tail Power Company, is DENIED as moot;
3. The Motion to Intervene of Lignite Energy Council is DENIED as moot;
4. The Motion to Intervene by State of North Dakota and North Dakota Department of Health, a State Agency, is DENIED as moot; and

5. The hearing set for Friday, April 16, 2004 at 3:00 P.M. on these motions is  
VACATED.

Dated: April   , 2004 in Denver, Colorado.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Lewis T. Babcock", is written over a horizontal line.

LEWIS T. BABCOCK, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 03-B-1939 (BNB)

The undersigned certifies that a copy of the foregoing ORDER was served on April 4, 2004,  
2

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Defendants.

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ORDER

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It is hereby ORDERED that Plaintiff's Motion for Summary Judgment, filed on  
December 24, 2003, is DENIED.

Dated: April 1, 2004 in Denver, Colorado.

BY THE COURT:



Lewis T. Babcock, Chief Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 03-B-1939 (BNB)

The undersigned certifies that a copy of the foregoing ORDER was served on April 1, 2004,  
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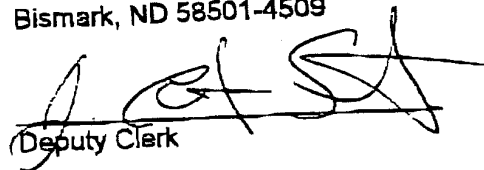
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